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POWER OF UNITED STATES TO FIX INTRASTATE RAILROAD, TELEGRAPH AND TELEPHONE RATES UNDER THE WAR CONTROL ACTS.

The debate is ended. No longer, for practical purposes, is it possible to contend that the federal government may fix the rates of railroad, telegraph and telephone service, locally and interstate, so long as the government properly retains control over the railroad, telegraph and telephone lines of the country. In two recent cases the Supreme Court of the United States has held that under the war powers of Congress the control given to the President over railroads, telegraph and telephone lines was practically unlimited. The President is practically the owner of these great public utilities for practically all purposes. Northern Pacific Ry. Co. v. State of North Dakota (June 2, 1919, not yet reported); Dakota Central Telephone Co. v. State of South Dakota (June 2, 1919, not yet reported).

In recent editorials we have considered various phases of this question solely, however, with regard to right of the Postmaster General to fix intrastate telephone rates. (88 Cent. L. J. 335, 407.) In these editorials we took the position that Congress did not intend to grant to the President powers which were not necessary to the administration of the properties taken over, having regard to the emergencies created by the war. We still are inclined to our opinion, although, in view of the final disposition of the question, our contention is purely academic.

It might be said that very few lawyers have contended that the powers granted to the President to control the instruments of interstate commerce were limited by the commerce powers of Congress. But since some lower tribunals have raised that question the court properly disposes of it by saying that Congress in this respect was acting under its war powers and not *under* its power over interstate commerce. On this point the court said:

"On the face of the statutes it is manifest that they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used. (Cox v. Wood, 247 U. S. 3.)"

There can be no doubt today, whatever may have been the opinion heretofore, that there is no greater power possessed by Congress than the war power. It is complete, undivided and without apparent restriction. Whatever Congress believes to be necessary to win a national conflict in which the people are engaged, it has power to command. Selective Draft Law Cases, 245 U. S. 366; Ex parte Milligan, 4 Wall. 2; Legal Tender Cases, 12 Wall. 457.

The question, then, of the power of the President to fix intrastate railroad, telegraph and telephone rates is purely one of the interpretations of the Acts of Congress which grant the powers sought to be exercised. In the case of the railroads this grant of power is more definite and clear than in the case of telegraph and telephone lines. On the 29th of August, 1916 (39 Stat. 645), Congress gave the President power "in time of war * * * to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

It may be admitted, as the court contends, that what may be "needful or desirable" is a question wholly for the executive to determine, without interference by the courts. But this certainly is not true of the phrase, "or for such other purposes connected with the emergency," which clause the court does not construe, except to say that the act confers upon the President "complete possession and control for all purposes." It is quite evident that but for the clause we have just quoted the powers of executive control would be limited to the transportation of troops and material. And, giving to the clause quoted the broadest possible meaning, the Act still seems far from giving to the President that complete possession and control for all purposes" which the Supreme Court declares that it gives. It would have been easy for Congress to have used the expression, "for all purposes," instead of the phrase, "for purposes connected with the emergency." It comes very near to being an act of legislation for the court to substitute one phrase for the other.

The opinion in the North Dakota Case (Railroad Rate Case) is, because of the mistaken premises of the court, very unsatisfactory. The court passes over very superciliously the various suggestions offered to prove certain limitations which Congress apparently intended to put upon the powers granted to the President by the remark often reiterated that these suggestions were inapposite in view of the *plenary* powers granted by the act. Thus, to quote one instance:

"It is argued that as state control over intrastate rates was the rule prior to the enactment of the statute creating United States control, the statute must be interpreted in the light of a presumption that a change as to state control was not made. But in view of the unambiguous provision of the statute as to the new character of control which it created, the principle of interpretation applied in its ultimate aspect, virtually was: that because the statute made a fundamental change, it must be so interpreted as to prevent that change from becoming effective. The presumption in question but denied the power exerted in the adoption of the statute, and displaced by an imaginary the dominant presumption which arose by operation of the Constitution as an inevitable effect of the adoption of the statute."

If the court had begun with the assumption, which to us seems very clear that Congress intended to grant limited and not plenary powers of control to the President, limited by "purposes connected with the emergency—it might have found as a matter of construction that the fixing of intrastate rates was by reason of "economic necessity," essential to effect the purposes for which the power was granted. But instead of this the case is disposed of by the unnecessary and dangerous assumption of plenary powers of control—an assumption that may give the court some trouble when other phases of the effect of government control come before the court.

The court takes the same position in the telegraph and telephone rate case (The South Dakota Case), although with apparently more misgivings, as it does in the railroad rate case, to-wit: that the President was given full and complete control of telegraph and telephone lines for all purposes. On this point the court said:

"But although it may be conceded that there is some ground for contending, in view of the elements of authority enumerated in the resolution of Congress, that there was some power given to take less than the whole if the President deemed it best to do so, we are of opinion that authority was conferred as to all the enumerated elements and that there was hence a right in the President to take complete possession and control to enable the full operation of the lines embraced in the authority."

In the telegraph rate case, however, the court acknowledges the force of the argument of a limitation on the Presidential powers by the proviso in favor of the police powers of the state taken into connection with the express declaration that the state should not legislate concerning the issue of

stocks and bonds by telegraph or telephone companies. On this point the court said:

"It was conceded that the words 'police power' were susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority, and the other a narrower one including only state power to deal with the health, safety and morals of the people. Although it was admitted that the reservation, considered intrinsically, was not susceptible of being interpreted in the broader of the two lights, it was held that it was necessary to so interpret it because of the clause of the proviso prohibiting the states from legislating concerning the issue of stocks and bonds by the companies during the United States control. The reasoning was this: It was inconceivable, it was said, that the subject, stocks and bonds, should have been withdrawn from state control by an express prohibition unless that subject would have been under state control in the absence of the prohibition, a result which could only exist by giving the saving clause as to police power its widest significance. But the fact that the rule of construction applied had the result of incorporating in the act of Congress unlimited state authority merely as the result of a prohibition by Congress against the exertion of state police power in a specific instance, in and of itself admonishes of the incorrectness of the rule. But its want of foundation is established by two further considerations: (1) because it causes the provision as to stocks and bonds, which was plainly enacted to preserve the financial control of the United States over the corporations, to limit if not destroy such control; (2) because by converting the prohibition against state power into an affirmative and comprehensive grant of that power, it so interprets the act as to limit the grant of authority which the act beyond doubt gave to the United States."

There can be no doubt that if the power to fix intrastate rates had been expressly granted to the President, such power would supersede the state's inherent power to fix such rates. This is true in conformity with the principle that wherever the federal government is given power to act under the Constitution, the exercise of that power supersedes and displaces all state authority. But, conceding that Congress could have granted such authority to the President, either expressly or by necessary implication, the question still remains: Did they grant the power to fix rates? There is some ground for believing that such power was given by implication in the case of railroads in view of Sec. 10 of the Act of March 21, 1918, which distinctly gives the President the power to "initiate rates" by filing with the Interstate Commerce Commission." But no such power is given in the case of the telegraph lines. It was stated in the debate in Congress upon the bill giving the President authority to take over the telegraph lines, that Congress would probably deal with the question of rates in *a subsequent act*, as they had done in the case of the railroads. This in itself is sufficient to establish a clear distinction between the two cases. Not only did Congress fail to give the President authority to fix intrastate telegraph or telephone rates, but the exercise of such a power seems to us to have been clearly unnecessary "for the national security or defense."

NOTES OF IMPORTANT DECISIONS.

DIFFERENCE BETWEEN GUARANTY AND SURETYSHIP IN RELATION TO THE RUNNING OF THE STATUTE OF LIMITATIONS.—It is often necessary for attorneys to keep in mind the distinction between the contract of the guarantor and that of the surety. The distinction is important for various practical reasons. A recent case illustrates its importance in reference to the application of the Statute of Limitations. In Homewood Peoples Bank v. Hastings, 106 Atl. Rep. 308, the Supreme Court of Pennsylvania held that a contract to "guarantee" the payment of a demand note is a contract of suretyship and that therefore the Statute of Limitations runs from the date of the note since the obligation of a surety is coterminous with that of the creator.

In this case the interesting point was raised whether the tolling of the Statute of Limitations by part payment by the maker of the note, tolled also the operation of the statute as to the contract of suretyship. But the court properly held that the surety's contract was

"primary" and not "secondary," as in the case of a guaranty, and therefore was not affected by the actions of the principal in respect to his contract. On this point the court said:

"The note in controversy here, being payable on demand, became due immediately (Boustead v. Cuyler, 116 Pa. 551, 8 Atl. 848), thus fixing the liability of the person guaranteeing payment of the obligation as of the day on which it was executed and also creating the liability of suretyship as distinguished from technical guaranty. The debt would therefore be outlawed in six years from the date of the note. The fact that the principal debtor made payment of interest on the note up to February 6, 1912, which was within six years previous to the beginning of the action, and thus tolled the Statute of Limitations as to him, could not prevent the surety from setting up the statute in bar of an action against the latter on his contract (Meade v. McDowell, 5 Bin. 195; Newell v. Clark, 73 N. H. 289, 61 Atl. 555). His obligation arose at the time the contract was entered into, and his rights cannot be affected by subsequent acts of the principal debtor which would prevent the running of the statute (Clark v. Burn, 86 Pa. 502; McMullen v. Rafferty, 89 N. Y. 456; Carpenter v. Thompson, 66 Conn. 457, 34 Atl. 105; Gardiner v. Nutting, 5 Me. 140, 17 Am. Dec. 211)."

The difference between the two contracts is that one (the surety) promises jointly with the principal that the contract will be performed; the other (the guarantor) promises that the principal will perform. The surety promises to see that the debt is paid at a time certain; the guarantor promises that he will pay if the principal does not. The former therefore can be sued with the principal but the latter cannot. If a contractor promises to see that a debt is paid on a date certain, it is one of suretyship; if no time of payment is fixed for the performance of the collateral contract, the promise is a mere guaranty. Thus if I guarantee that a mortgagor will pay the mortgage *when due*, I am a surety; if I merely promise to see that the mortgagor shall pay the mortgage, I am a guarantor.

RATIFICATION OF AN INFANT'S CONTRACT ON COMING OF AGE AS AFFECTED BY HIS KNOWLEDGE OF HIS RIGHT TO DISAFFIRM.—That absolutely untrue yet essentially necessary legal paradox that all persons are presumed to know the law has recently been applied by the Supreme Court of Illinois to deprive an infant on coming of age of his right to disaffirm an executory contract to purchase real estate when he had ratified it in ignorance of his right to disaffirm. (Rubin v. Strandberg, 122 N. E. 808.)

In that case the infant was induced to enter into a contract for the purchase of certain lands. After coming of age on October 7, 1915, he made two partial payments on the purchase price, one in November and another in December. He refused to make the January payment and elected to disaffirm. The court held that his two payments on account after coming of age amounted to a ratification and was not affected by his knowledge of his right to disaffirm. On this latter point the court said:

"The payments in November and December, 1915, evidenced his intention to comply with his contract and were a ratification of it unless, as contended, he did not then know the law authorized him to disaffirm it. In our opinion defendant's acts after becoming of age must be regarded as done in the light of knowledge of his legal right to disaffirm; that he was presumed to know the law, and cannot be heard to say that he was ignorant of his legal right in that respect and performed the alleged acts of ratification in ignorance of that right. Upon this particular question the authorities are not altogether in accord, but in our opinion the more logical reasoning sustains that proposition."

There can be no doubt of the correctness as well as the justice of the rule announced by the Illinois court. We believe it will be found that most of the cases which announce a contrary rule have in them some element of fraud which in connection with infancy afford a right of disaffirmance. Where fraud is an element, the rule is well recognized that the party defrauded may disaffirm after discovery of the fraud.

RIGHT TO PRIORITY IN DISTRIBUTION OF PROCEEDS OF MORTGAGED PROPERTY AMONG ASSIGNEES OF NOTES SECURED BY ONE MORTGAGE.

It is perhaps unnecessary to say that no single question passed upon by the courts of last resort in the various states of the Union has given rise to greater diversity than the determination of the rights of assignees of separate notes secured by the same mortgage to priority in the distribution of the proceeds of the mortgaged premises, when the amount realized therefrom is insufficient to pay all of the notes in full. The decisions of the various jurisdictions which have ruled on the question may be divided into three classes. One line

of decisions holds that where several notes maturing at different dates, and which are secured by the same mortgage, and which are assigned to different persons, at different times, in the absence of anything in the contract showing an intention to adopt a different order of payment, they must be paid in the order in which they were assigned, and that the first assignee in point of time is entitled to priority.[1]

Another class of decisions hold that where several notes are secured by the same mortgage and which mature at different times, and are assigned to different persons at different times, that the assignees are entitled to priority in the order in which the notes mature, without regard to the date of their respective assignment.[2]

Another class of decisions hold that in the absence of a contract governing the matter of priority, or particular circumstances giving a superior equity to one holder, the proceeds of the mortgaged property in case the amount realized is insufficient to pay all of the notes in full, shall be applied to the payment of all the notes pro rata, without regard to the dates of maturity of the notes, and without regard to the dates of the assignment of the same.[3]

(1) Cullum v. Erwin, 4 Alabama 452; McClintic v. Wise's Admrs., 25 Grat. (Va.) 448, 18 Am. Rep. 694; Griggsby v. Hair, 25 Ala. 327; Waterman v. Hunt, 2 R. I. 298; Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. 1090; Barkdull v Herwig, 30 La. 618.

(2) Wilson v. Hayes, 6 Florida 171; Sargent v. Howe, 21 Ill. 148; Smith v. Smith, 32 Ill. 198; 30 N. E. 346, 33 Am. St. Rep. 290; Isett v. Lucas, 17 Iowa 503; Walker v. Schreiber, 47 Iowa 529; Corbin v. Kincaid, 33 Kas. 649, 7 Pac. 145; Mitchell v. Ladew, 36 Mo. 526; Johnson v. Brown, 31 N. H. 405, Shaw v. Crandon State Bank, 145 Wisc. 639, 129 N. W. 794; State Bank v. Tweedy (Ind.), 8 Black. 447; Anderson v. Sharp, 44 Ohio St. 260, 6 N. E. 900.

(3) Penzel v. Brookmire, 51 Ark. 105, 14 Am. St. Rep. 23; Phelan v. Olney, 6 Cal. 480; Lewis v. De Forrest, 20 Conn. 427; Smith v. Bowne, 60 Ga. 484; McClanahan v. Chambers, 1 T. B. Mon. 43; Begnaud v. Roy, 21 La. Ann. 624; Holway v. Gilman, 81 Me. 185; Dixon v. Clayville, 44 Md. 573; Burnett v. Pratt, 22 Pick. 556; Jennings v. Moore, 83 Mich. 231, 47 N. W. 127; Hall v. McCormick, 31 Minn. 280, 17 N. W. 620; Parker v. Mercer, 6 Howard (Miss.) 320, 38 Am. Dec. 438; State Bank v. Mathews, 45 Neb. 659, 63 N. W. 930, 50 Am. St. Rep. 565; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9; Kitchin v. Grandy, 101 N. C. 86; Wilson v. Allen, 11 Ore. 154; Donley v. Hayes, 17 Serg. & Rawl. (Pa.) 400; Gorden v. Hazzard, 32 S. C. 351; Shields v. Dyer, 86 Tenn. 41; Paris Bank v. Beard, 49 Tex. 358; Keyes v. Wood, 21 Vt. 331; First Nat'l Bank v. Andrews, 7 Wash. 261.

It is manifestly impossible within the limits of this article to give even a synopsis of the holdings of the above mentioned courts, but the grounds upon which the various rulings are based may be briefly indicated. Taking the rulings in the order of the foregoing classification, the cases holding that the priorities are to be determined by the date of the assignments of the respective notes rest their ruling on the ground that the debt secured was the principal and the mortgage was an accessory or incident, and that the transfer or assignment of a part of the debt carried with it the assignment of so much of the lien created by the mortgage as is necessary to pay the part assigned as effectually as it existed in the mortgage, and that no second assignment can divest the first assignee of his lien and preference or priority. That upon the maturity of the note so held by him and default having been made in its payment, the holder may proceed to foreclose the mortgage. In some of the early cases the rulings referred to are based upon the equity maxim, *Qui prior est tempore, potior est jure;* that when there are equal equities, the first in order of time has the better right.

The ground of the rule of the second of the above mentioned classes of decisions —or the reason that is usually advanced, is that the rights of the assignees are to be determined from the date of the maturity of the notes, and that the different installments are to be regarded as so many successive mortgages and each has priority according to the date that the same matures, and that the first note maturing may foreclose the security on default of payment without waiting for the succeeding notes to mature.

The reason advanced in most of the decisions which hold that the proceeds of the

mortgaged premises should be applied pro rata on all of the notes is that the mortgage is as much security for one note as another, and that there is no priority of lien in favor of one as against another, for the mortgage is one, and the mortgage being simply an accessory or incident to the debt, an assignment of a part of the debt carries with it a pro rata proportion of the security. That, therefore, the different holders of the mortgage debt stand *aequali jure*, and are consequently entitled to participate pro rata in the fund derived from the security in the event the amount of the proceeds of the mortgaged premises are insufficient to pay the whole indebtedness.

From the writer's investigation the courts of thirty-six states have passed upon this question, and numerically considered, the greater number support the doctrine that in the absence of some special equity in favor of one holder as against the others, the rule that the proceeds should be applied pro rata among the assignees without regard to priority as to time of maturity or time of assignment.

The rule that the question of maturity of the notes shall determine the right of priority is adhered to by a smaller number of states, notably by Iowa, Illinois, Florida, Kansas, Missouri, New Hampshire, Wisconsin, Ohio and Indiana, while the rule that the date of the assignment of the notes determines the right to priority is adhered to in the states of Alabama, Virginia, West Virginia, Rhode Island and possibly one or two others.

The first time this question seems to have demanded the consideration of the courts of last resort was in the case of Donley et al. Assignees of McKean v. Hayes.[4] The facts set out in the opinion show that a mortgage was executed on certain land to secure a debt evidenced by eight bonds payable at different periods, and that the mortgagee assigned five of the bonds to five persons at different times, retaining three of the bonds himself, and that default was made in the payment of the first installment of the mortgaged debt, a foreclosure was had and the case came to the court on the question of the distribution of the proceeds of the mortgaged premises, the same being insufficient to pay the whole of the notes in full. It may be of interest to set out a portion of the court's opinion as showing the reasons upon which they rest their ruling. Mr. Justice Tod, speaking for the court, says: "The court below decided that the funds be paid according to the priority of the maturity of the installments secured by the mortgage; that there can be no apportionment, but that the first installment be paid first, and the other installments as they become due, as far as the money will reach. In this case, under the circumstances of it, I take the rule to be that the holders of the bonds are to come in each one for his equal proportion and no more. Perhaps no case on either side directly in point, can be found in the books. Some cases resembling this in principle might be mentioned in which a preference such as is here claimed could most clearly not be permitted. A man dies insolvent in part: he owed two bonds, both due to the same person, who has transferred the first bond to A, and the other on the next day to B. The estate pays fifty per cent, and A insists that he, holding the bond first payable and first assigned, is entitled to his whole debt, and that B is entitled to nothing. Again, a father, as sometimes happens, divides his estate among his children by the assignment of bonds and notes. After a while, upon a loss happening, one, two, or three of them discover that their assignments were first made, and claim the whole of the money. Or, a holder of twenty bank shares assigns them on twenty different days to twenty different persons, and, upon winding up, a loss happens. I believe it never would be contended that the owner of the share first assigned shall be indemnified, and his share made up to its full nominal amount at the

(4) 17th Sergant & Rawle (Penn.) 400, decided July 3, 1828.

expense of the subsequent assignees. It is said that the bank shares are entirely separate and distinct things, and are connected so far only as that a common fund gives them value, and that they are assignable by the express terms of the law. It might be suggested in answer that, so were Walton's bonds separate and distinct things, and connected by deriving their value from a common fund, the mortgage, and by express law are assignable. Equality is equity. One important head of equity and law, too, is average contribution; by which an unexpected loss shall be divided among all who are concerned in the matter in proportion to their interests. The doctrine of *prior in tempore* is, I think, misapplied to this case. Priority of grant I can understand. So, priority of judgments, for a judgment may be considered *pro tanto* a grant of land. But a grant of land gives no priority right to a tract of land adjoining. Here, the bond assigned to Cowden was not the same that had been assigned to J. Brown and M. Brown, but a totally different instrument. It is precisely the business of the mortgage to protect the last bond as it is to protect the first. It is as old a lien for the one as for the other. I admit the doctrine that a man shall not transfer a better right than he himself has, but in my apprehension the doctrine is inapplicable in this case. We ought to give as little room as possible for uncertainty and litigation. Bonds are frequently sold, handed over, deposited, pledged without assignment. And who does not see only mistakes without number, but the temptation to fraud and the facility of committing it by ante-dating a transfer, if the whole value of the instrument is to depend upon the date of the assignment? The general doctrine is supported by the following cases (citing three or four English cases in chancery). Applying the principles to the present case, and without evidence of any compact between the assignor and the assignees of the bonds, I am of the opinion that there is no preference implied by the law, and that the bonds are to be paid in equal proportions." The case from which the above quotation is made has been repeatedly followed in practically all of the states which have adopted the rule announced in Donley v. Hayes, and may be said to be *stare decisis* in those jurisdictions.

Chief Justice Gibson dissented in a strong opinion, however, and his opinion so written has been followed by the Supreme Court of Alabama in the leading case in that jurisdiction, *viz.*, Cullum v. Erwin, *supra*, and may be briefly quoted from in order to show the line of reasoning upon which the rule is based which holds that the date of the assignment of the notes determines the priority.

Chief Justice Gibson, among other things, said: "My position is that the assignee is a purchaser for a valuable consideration of all the securities of the assignor *and of all of his remedies*, and may use them in any way he may think proper, as freely and as beneficially as could the assignor himself, to whom it was indisputably competent at the time of the assignment to order the mortgage to stand as a security in the first place for the installment due on the particular bond. If such be the rule of priority between the assignor and the assignee, it is easy to show that it holds amongst the assignees in succession of separate parts of the same debt. In Clowes v. Dickinson, already cited, the question of contribution, which was among purchasers of separate parts of an encumbered estate, was determined upon the principle that subsequent purchasers can stand in no better equity than he from whom they purchased. *Prior est in tempore potior est jure*, is a maxim which concerns equitable as well as legal rights and to which there is no exception, but the case of a subsequent encumbrancer who has not the legal estate, of the benefit of which chancery will not deprive him unless he has had notice of the prior encumbrance without which there is equity against equity, and the party having the

legal title will prevail. In this case, had the subsequent assignees obtained a legal assignment of the mortgage it would have made a difference, for as there would have been equity against equity, the legal title must have prevailed. But as neither party has anything but an equity, priority of title is priority of right. I am of the opinion that the money in the hands of the defendant should be applied in satisfaction of the bonds in the order in which they were assigned."

In the case of Cullum v. Erwin, *supra*, the Supreme Court of Alabama, in their opinion say: "The only authority brought to our notice adverse to the view here taken is the case of Donley v. Hayes,[5] in which the majority of the court held that where a mortgage was given to secure a debt due by eight different installments for the payment of which eight bonds were executed, five of which the mortgagee assigned to different persons at different times, and retained three himself, and the fund arising from the sale of the mortgaged premises having proved insufficient to pay the entire debt, that the respective assignees of the mortgagee were entitled to a *pro tanto* dividend. We cannot yield our assent to this decision, and think that the dissenting opinion of Mr. Justice Gibson is the law of the case. It will be observed that the principle upon which the majority of the court rest their decision compelled them to hold that priority of assignment not only gave no preference as between the assignees, but also that the assignee acquired no preference as against the assignor. The vice of the opinion is that the court appear to consider the debt and the mortgage executed to secure its payment as having no necessary connection, when the well settled doctrine is that the mortgage is merely an accessory or incident, and the debt the principal."

The case last cited is the leading case in Alabama, and has been repeatedly followed in that jurisdiction and may be said to be a rule of property in that state.

The same rule obtains in the states of West Virginia and Virginia. In the latter state, the case of McClintic v. Wise's Admrs.,[6] the Supreme Court quote with approval from the opinion in Griggsby v. Hair,[7] in which it is decided that where several notes taken for the purchase money of land, are assigned at different times, the assignment of each note is *pro tanto* an assignment of the vendor's lien, unless expressly waived, and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes.

As supporting the rule that priority of maturity of the notes should determine the right of the assignees to participate in the distribution of the proceeds of mortgaged premises where the amount is insufficient, we will quote briefly from the decision in the case of State Bank v. Tweedy.[8] In that case the court says, "There is but one question in this case and arises upon the following facts: On the 18th of March, 1839, Horace Cook and wife executed to Alexis Coquillard a mortgage on three thousand acres of land to secure payment of $5,000.00, payable in annual payments of $1000.00 each, for which notes were executed. Coquillard assigned the three notes last falling due to plaintiff, and thereafter assigned the two other notes first coming due, together with the mortgage, to the defendant." The mortgage being foreclosed and the proceeds being insufficient to pay all the notes, the question for the court was, "How is the mortgage fund to be applied?" Proceeding, the opinion reads, "This state of the authorities leave the question, How is the mortgage fund to be applied in payment of notes secured, falling due at different times, an entirely open one for our consideration, and for decision upon general principles. That ap-

(5) Supra.

(6) 25 Gratt. 448.
(7) 25 Ala. 327.
(8) 8 Black. (Ind.) 447, 46 Am. Dec. 486.

plication, it seems to us, should depend upon the nature of the mortgage contract. What, then, is the proper meaning or construction to be given to a mortgage in the common form, executed to secure a debt evidenced by several promissory notes payable at different times?

That meaning or construction must depend much upon the law of the remedy or remedies upon such notes and mortgage, for these contracts, as well as others, are made under, and with an eye to, the laws governing their enforcement. In this state, if no statute interposes, a mortgage securing a debt payable by installments, may be foreclosed on default of payment of the first installment, and the mortgaged property sold for the payment of that installment. * * * The law, then, may be stated in general terms to be, in this state, that the holder of the first of several notes secured by mortgage may, if he chooses, when the note becomes due, enforce the full payment of it out of the mortgaged premises, they being sufficient for that purpose, and that the holder of the second note may in like manner obtain priority over a third, and so on. It cannot be stated, then, as a general proposition, that in this state the assignment of any one of the notes secured by a mortgage carries with it, either pro rata or pro tanto, a corresponding portion of the mortgage security; but, as appears from what has been said, the effect of such assignment is to carry a *pro tanto* interest in that security, subject to the paramount claim of notes previously due. The different installments in a mortgage when secured by corresponding notes, may be regarded as so many successive mortgages, each having priority according to its time of becoming payable."

The decision above referred to has been uniformly followed in Indiana, and has become a rule of property in that jurisdiction.

In an early case in the state of Missouri, Mitchell v. Ladew,[9] this question arose in a case where a trust deed had been executed to secure the payment of three notes, each for $4,566.66, due in one, two and three years, the first of which notes being paid when due, and default being made in payment of the other two notes, which had been transferred to other parties, and on foreclosure and sale of the real estate, the proceeds were insufficient to pay both notes in full. In that case the Supreme Court of Missouri criticise the ruling in the case of Donley v. Hays, and say: "The cases adhering to the doctrine that the application of the funds should be made *pro rata,* irrespective of the time when the notes come due, have all been decided on the authority of Donley v. Hays. It was then held by the Supreme Court of Pennsylvania that where a mortgage is given to secure a debt, which is evidenced by bonds payable at various periods, and the holder of the bonds assigned some of them to different persons at different times and retained the balance himself, and the fund arising from the sale of the mortgaged premises by execution against the mortgagor fall short of the whole mortgage debt, the respective assignees and mortgagee are entitled to a pro rata dividend of the proceeds according to the amounts of their bonds by them held. The court based its decision principally upon several old English chancery decisions, which arose out of settlement cases, and where the funds proving insufficient, the chancellors had ordered contribution to be made.

With all deference for that learned and intellectual tribunal, we are unable to perceive that they have really any particular bearing on the subject. Chief Justice Gibson delivered a most able dissenting opinion, and his position seems to be the best sustained by authority and reason. * * * But we think the weight of authority is decidedly in favor of the rule, as it has been declared that different debts secured by the same mortgage, are to be paid from the mortgage fund in the order in which they fall due. * * * The debts being the

(9) 36 Mo. 526.

principal thing, a mortgage or deed of trust to secure it is merely an accessory or incident, and the transfer of the debt carries with it the equitable right to the trust property. And where there are several notes so secured, and they are assigned to different persons, each assignee takes an equitable interest in the property *pro tanto*. The question now is, How is the trust fund to be applied in payment of notes falling due at different times? From the authorities, this is entirely open for our consideration and decision. * * * It is indisputable that when the first note became due, if it had not been paid, the trustees might have sold the property and applied all the proceeds to satisfy it, had there not been more than sufficient arising out of the sale for that purpose; so, when the second note became due and payable, a like sale might have been had, and the money arising therefrom been wholly absorbed in its application to the payment of said note before the third fell due."

In a comparatively recent case decided by the Supreme Court of Wisconsin, *viz.*, Shaw v. Crandon State Bank,[10] the court quotes from the decision of one of the earliest cases of that court, *viz.*, Marine Bank v. International Bank,[11] with approval, as follows: "We were well aware that in some of our sister states a contrary doctrine had obtained, and that it had been held that the fund arising from the sale of mortgaged premises, in case of a deficiency, should be ratably apportioned among the holders of the different notes or instruments; but when no special equities intervened to vary the rule, we thought the note or instrument first becoming due was entitled to priority in payment. And, without enlarging upon the reasons that led us to this conclusion, it appeared to us that this priority must exist, under our statute, as the notes were the principal and the mortgage but an accessory, and the holder of the first note, upon default in its payment, had a right to commence his action, and subject the mortgaged premises to foreclosure and sale for the satisfaction of his debt. It seemed to us, therefore, that the maxim of *prior est in tempore, portior est jure*, rightly applied, in the absence of all equitable considerations, between the assignor and the assignees to change this rule or principle of law."

The Supreme Court of Iowa, in Rankin et al. v. Major,[12] follow the rule of the case of Grapengether v. Fejervary,[13] which follows the Indiana rule announced in State Bank v. Tweedy, 8 Black. 449, above quoted from, and has consistently adhered to that ruling down to the present time. The same rule obtains in Illinois, the court holding that "the different installments of a mortgage secured by corresponding notes, may be regarded as so many successive mortgages, each installment having priority according to its time of coming due.[14]

Coming now to the consideration of cases holding that where the mortgaged premises, after foreclosure and sale, are insufficient to pay all of the notes, that the holders thereof are not entitled to any priority, but that the proceeds should be applied to each of the notes pro rata, we will briefly mention two or three of the decisions in which the respective courts set out the reasons upon which they rest their ruling.

In the case of Penzel v. Brookmire,[15] that court, in passing upon the question as to whether or not the holder of the first of three notes assigned and the first falling due should have priority, or whether the fund arising from the sale of the mortgaged premises should be applied pro rata to all three of the notes, said: "In the absence of a stipulation or agreement or special equities, the authorities are not agreed as to how the proceeds of the sale of property

(10) 120 N. W. 794.
(11) 9 Wis. 57.
(12) 9 Iowa 297.
(13) 9 Iowa 163.
(14) Chandler v. O'Neil, 62 Ill. App. 418.
(15) 51 Ark. 105, 14 Am. St. Rep. 23.

mortgaged to secure the payment of several notes, and sold under the mortgage, shall be appropriated when the notes secured mature at different times, have been assigned to different persons, and the proceeds are not sufficient to pay all of them. After proceeding to state the three rules above set out, the court then says: "The reasons assigned for the two doctrines (that priority should be determined in favor of the date of the assignment, and that it should be determined according to the date of the maturity of the notes) are not convincing. While the notes were in the hand of the mortgagee there could be no priority of liens. He was not bound to foreclose when default was made in the payment of the note first falling due. He could have waited until all became due, and then, if the mortgage empowered him to sell when default should be made in the payment of any one of the notes, have sold the property and appropriated the proceeds of the sale, if the mortgage did not forbid, to the payment of any of the notes, if there were not more than enough for that purpose.[16] If he appropriated the proceeds to the payment of the note first falling due, it thereby attained a preference through the act of the mortgagee, and so might have the second or last in the same manner. The mortgagee being the owner of all the notes unrestricted by the mortgage, can give the preference in the appropriation of the proceeds to either of them, by virtue of his ownership and control over the entire mortgage debt; and the question of preference or priority in right to payment out of the proceeds can only arise when there is a diversity in the ownership of the debt secured. Hence the assignment of one of the notes could not, *ipso facto*, carry with it the right to be paid in preference to the other notes, because the mortgagee had the right to appropriate the proceeds of the sale of the property mortgaged to its payment; for the condition on which the mortgagee could have exercised the power does not exist in the case of the assignee of one of the notes; and for the same reason it follows that the assignee of the note first falling due is not entitled to preference, because the mortgagee could have given preference in the appropriation of payments when he owned all the notes. The comparison of a mortgage given to secure several notes to successive mortgages given to secure each one of them does not support the doctrine it is made to prove. To make the cases analogous, the mortgages to secure each note must bear the same date, and be executed, delivered, and filed for record, and recorded at the same time, and the property mortgaged must be the same. In the latter case, the mortgages would be concurrent; neither one would have preference over the others, and all would have equal claims, to be paid ratably out of the property mortgaged. If one should be transferred to a third party it would not thereby become paramount to the others, but all would stand on an equality. Hence the comparison does not sustain the doctrine that the notes, while in the hands of different persons, are entitled to priority of payment according to the order in which they mature. We do not think that either of the doctrines referred to is sustained by reason or equity. The notes are secured by one mortgage; executed for the benefit of all. It does not provide that one note shall be preferred to others, but secure all equally, or *pro rata*. The legal title to the property mortgaged is conveyed and held for the benefit of all. The rights and interests acquired in the property begin with the date of the mortgage, and not from the maturity or assignment of the notes, or the time when the cause of action arises. There can be no priority or rights in favor of one against the others, as the mortgage is one. The simple assignment of the notes does not change the mortgage, and make it any less security for any of the notes than it was before the assignment. The mortgage

(16) Saunders v. McCarthy, 8 Allen 42; Allen v. Kimball, 23 Pick. 473; Mathews v. Switzler, 46 Mo. 301.

security, in following the transfer of the notes as an incident, does not pass by the assignment any further than it was an incident at the time the transfer was made. The holders of the notes, therefore, stand *aequile jure*, and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all."

The rule announced in the above decision was followed by a divided court in the case of Gordon v. Hazzard,[17] McIver, J., dissenting in an opinion which supports the doctrine that the priority of payment is to be determined by the date of the assignment of the note, and as the reasons advanced are well and clearly stated, it may not be uninteresting to quote from his opinion in support of that rule. Justice Iver expressed it as his opinion that as between the assignees of bonds falling due at different times, and assigned at different times to different persons, that priority should be given to the note which was first assigned, without regard to maturity. That it is a well established rule that as between the assignee and the mortgagee, or assignor, the assignee is entitled to preference, and that this being so, he could not be deprived of his equity by any subsequent act of the assignor to which the assignee had not agreed, could not prevent, and of which he had perhaps no knowledge. Proceeding, he said: "If the mortgagee, after having assigned one of the bonds secured by the mortgage, holds the same subject to the prior right of his assignee, it would seem to follow that as he could not transfer to another any higher or better right than he himself had, the second assignee must take subject to the rights of the first assignee. This would work no injustice to the assignee; for the terms of the mortgage, of which he is presumed to have notice, would inform him that it was given to secure two separate bonds. Ordinary prudence would therefore suggest to the purchaser the inquiry, what had become of the other bond; and such inquiry would lead to the discovery of the fact that it had previously been assigned to a third person, who had thereby acquired a priority over the mortgagee; and if, in the face of this information, the purchaser saw fit to buy the other bond, which he knew was then subject to the bond previously assigned, he would have no just ground to complain when such priority is subsequently asserted. In effect, the second assignee buys property which he knows is subject to the claim of a third person, superior to his vendor or assignor, and such superiority follows it into his hands. Practically, though not in form, he buys or takes a lien upon property which he knows, or ought to know, is subject to a prior lien in the hands of his vendor, and he must take subject to such prior lien; for although it may not be correct to apply the term "lien" in this way, yet the principle involved is the same, and I have ventured to use the term simply as illustrative of the principle. The view which I have adopted is in close analogy to the well settled and undisputed doctrine that where a mortgagor sells to third persons, at different times, portions of the mortgaged premises, the first purchaser has an equity to require the mortgagee, when he comes to foreclose his mortgage, to sell the different portions in the inverse order of the sales by the mortgagor. This equity in the first purchaser exists, not only against the mortgagor, but also against the second and all subsequent purchasers. I do not see why, upon the same principles, the equity which the first assignee unquestionably has against the mortgagee should not also be recognized against the second assignee or purchaser. It is true that the mortgage was designed to secure the payment of both the notes; but when the mortgagee parts with one of them for a valuable consideration, equity will not allow him to enforce the security for the payment of the note which he has retained until his assignee, whose money he has received, has been paid; and a pur-

(17) 32 So. Carolina 351, 17 Am. St. Rep. 857.

chaser from him, the second assignee, has no higher rights than he has."

After reading the foregoing, any careful lawyer will freely concur in the conclusion of Mr. A. C. Freeman, editor of the American State Reports, that the decisions of the courts on the question above referred to are absolutely irreconcilable. The lawyer, too, who has carefully read what has been set forth and who has carefully considered the propositions involved, cannot fail to appreciate the difficulties encountered by the courts in trying to arrive at a just and equitable decision of the cases at issue. To the lawyer of a speculative turn of mind, a consideration of the subject affords to him an ample field for the exercise of his mental powers. And it is perhaps true, that in a company of ten or twelve good lawyers a discussion of the subject would find supporters for each rule, irrespective of the rule in their particular jurisdiction.

O. C. BROWN.

Indianola, Iowa.

GARNISHMENT—IMMUNITY.

DICKENS et al. v. BRANSFORD REALTY CO.

Supreme Court of Tennessee. March 29, 1919.

210 S. W. 644.

It is the settled policy of the state to hold immune from garnishment all municipalities and other governmental agencies.

GREEN, J. This suit was brought by the Bransford Realty Company, a creditor of B. T. Dickens, to subject the salary of the latter in the hands of his employer, Nashville Terminals, as garnishee, to the payment of the realty company's claim.

Nashville Terminals is a railroad corporation, handling the terminal business of the Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Railroad Company in Nashville, and said Terminals is and was at the time of this suit, being operated by the United States government.

The sole question presented is as to the liability of a railroad corporation operated by the government to be subjected to process of attachment and garnishment by a creditor of one of its employes.

The trial court held that such garnishment proceedings might be maintained, and rendered judgment accordingly. The Court of Civil Appeals likewise reached this conclusion, but held that execution upon such judgment could not be issued while the defendant was being operated by the United States government.

Both parties have brought the case to this court by petitions for certiorari, complaining of the judgment of the Court of Civil Appeals, in so far as adversely affected.

We are of opinion that garnishment proceedings cannot be maintained against such a defendant, under such circumstances, in this jurisdiction at least.

This court held long since that the comptroller of the state might not be garnished by a creditor of a state employe, to subject the salary of the latter. Bank of Tennessee v. Dibrell, 3 Sneed (35 Tenn.) 379.

Later it was declared that the same rule applied to garnishments against municipal corporations, arms, or agencies of the state, to subject the salaries of their employes. City of Memphis v. Laski, 9 Heisk. (56 Tenn.) 511, 24 Am. Rep. 327; Baird v. Rogers, 95 Tenn. 492, 32 S. W. 630.

In Bank of Tennessee v. Dibrell, supra, the court, speaking of such garnishments, said:

"Every consideration of policy would forbid it. No government can sanction it. It would be very embarrassing generally, and, under some circumstances, might prove fatal to the public service, to allow the means of support of the servants of the government to be intercepted in the hands of distributing agents. If the funds of the government, thus specifically appropriated for the support and maintenance of its agents, were allowed to be divested by process of attachment, in favor of creditors, or otherwise, from their legitimate object, the functions of the government might be suspended."

In City of Memphis v. Laska, supra, quoting from the Supreme Court of Illinois, in Merwin v. City of Chicago, 45 Ill. 134, 92 Am. Dec. 204, it was said:

"The city should not be subjected to this species of litigation, no matter what may be the character of the indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we shall leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters

wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits in order that one private individual may the better collect a demand due from another."

The court has likewise held that the funds of a municipal corporation in the hands of a third person might not be subjected to garnishment by a creditor of the municipality. Moore v. Mayor, etc., Chattanooga, 8 Heisk. (55 Tenn.) 850; Board of Directors v. Bodkin Bros., 108 Tenn. 700, 69 S. W. 270.

The principle seems to me that this court will not permit any obstruction of the financial administration of government. It will not permit any interference with the collection of its funds by a governmental agency nor with the disposition of such funds by a governmental agency.

The case of Board of Directors v. Bodkin Bros., supra, dealt with an attempt to attach the funds of the St. Francis levee district, which was a public corporation, clothed with governmental duties and functions, organized under the laws of Arkansas, with an office in the city of Memphis.

So, it will be seen that this court has extended the same immunity against proceedings by garnishment to agencies of other governments that it extends to agencies of the government of the State of Tennessee.

Under Public Act No. 107 of the Sixty-Fifth Congress, approved March 21, 1918 (Act March 21, 1918, c. 25, 40 Stat. 451 [U. S. Comp. St. 1918, Secs. 3115¾a-3115¾p]), and under previous statutes and the proclamation of the President, the railroads of the country, including the defendant Nashville Terminals, are now merely agencies or instrumentalities of the United States government.

While it is true Public Act No. 107 of the Sixty-Fifth Congress above referred to, very broadly authorized suits against such common carriers, still their liability to suit is not greater than that of the various municipal corporations of this state. Such liability, however, should be confined to their own creditors. Since it is the settled policy of this state to hold immune from garnishments all municipalities and other governmental agencies, we think such protection must be accorded to defendant Nashville Terminals, as it is now operated.

Moreover, Section 10 of the Act of Congress above referred to (U. S. Comp. St. 1918, Sec. 3115¾j), expressly provides that "no process, mesne or final, shall be levied against any property under such federal control," and this would doubtless preclude proceedings by attachment and garnishment.

We have not had occasion to consider in this opinion the effect of General Order No. 43, promulgated by the Director General of Railroads, September 5, 1918, which undertook to exempt carriers under federal control from proceedings by garnishment; however, as stated heretofore under our previous decisions, we think such carriers so operated are freed from such process.

It results that the judgment of the lower court will be reversed and this suit dismissed.

NOTE—*Garnishment of Salaries of Officers and Employes of Public Agencies.*—The instant case suggests an extension of the rule of exemption from garnishment process by holding that it ought to embrace all governmental agencies. The *argumentum ab inconvenienti*, or something in that nature, was held in Merwin v. Chicago, 45 Ill 134, 92 Am. Dec. 204, cited in the instant case, to bring a city within the exception as to corporations subject to garnishment, and it is somewhat on this line of reasoning that a railroad operated by the national government was by the instant case there placed.

In Board of Directors v. Bodkin, 168 Tenn. 700, 69 S. W. 270, it was ruled that a levee board having governmental powers and duties could not be garnished as to money owing to it, notwithstanding that the board had the power to sue and be sued. It was said this is like a city or county being sued, but this gives no right to interfere with its having control over public revenue it is authorized to collect or receive. But the Merwin case goes on the theory, that as to a debt it stands indifferent to a municipality and ought not to have to spend "money of the people and the time of its officials in the manmanagement of matters wholly foreign to the object of its creation."

Take a public service company and it is quasi-governmental in its functions. It is bound to use its resources so as to earn fair compensation therefor and it has the right to earn such compensation, as a constitutional right. Collier on Public Service Companies, § 117. No more than a city may it spend its money or the time of its officials in "matters wholly foreign to the object of its creation." The operations of courts cannot be interfered with as to money in their custody by garnishment process. Dale v. Brumby, 96 Md. 674, 54 Atl. 655, 64 L. R. A. 112. Except that it has been held, that if nothing remains to be done but pay over the amount money may be garnished. Dunsmoor v. Furstenfeld, 88 Cal. 522, 26 Pac. 518, 22 Am. St. Rep. 331, 12 L. R. A. 508.

But even in this sort of a case the remedy is more permissive than grantable of right.

But take it that garnishment is statutory only, then applicant for its benefits must come under

the terms of the statute. Many cases which recognize that private corporations come under the designation of persons, yet public policy has held that the word corporation does not include cities, towns and counties. Thus "generally it has been held that the word corporation does not include a municipal corporation." Bank of Tennessee v. Dibrell, 3 Sneed (35 Tenn.) 379; Sherman County v. Simonds, 109 U. S. 735, 3 Sup. Ct. 502, 27 L. Ed. 1093; Hughes v. Auburn, 161 N. Y. 96, 107, 55 N. E. 389, 46 L. R. A. 636. And why should it not be the same, where the purpose of a statute is wholly for the benefit of those in whom a public service company has no interest and for whom it can in no way expend its funds, because they are a trust fund not only for shareholders, but for the general public?

In this connection I notice a late case by Texas Court of Civil Appeals, wherein it was held that a municipal corporation does not come under the description of "person" in a statute giving a right of action for death by wrongful act, neglect or default. City of Dallas v. Halford, 210 S. W. 725. The reason may be stronger for this construction of such a statute than in garnishment, because the rule as to statutes in derogation of common law being subject to strict construction, and garnishment is not so much by way of such derogation as is a statute overturning the common law principle of non-survivorship of an action beyond the death of a tort-feasor. Considering the increasing application of regulation to public service companies, departure from it in favor of action for death of an employe would seem to demand express legislation.

C.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE MICHIGAN STATE BAR ASSOCIATION.

The twenty-ninth annual meeting of the Michigan Bar Association will be held at the University of Michigan, Ann Arbor, Mich., June 20 and 21, 1918.

The address of welcome will be delivered by Mr. Martin J. Cavanaugh, president of the Washtenaw County Bar Association; the president's address by Mr. George Clapperton, of Grand Rapids. Addresses will be delivered by the following: Mr. Fred A. Maynard, of Grand Rapids, on "Five to Four Decisions of the United States Supreme Court;" Mr. A. H. Ryall, of Escanaba, on "Public Utilities;" Dean Henry M. Bates, of the University of Michigan Law School, on "Legal Education." The annual address will be given by Hon. Samuel W. McCall, governor of Massachusetts, on "The League of Nations."

PROGRAM OF THE MEETING OF THE IOWA BAR ASSOCIATION.

The so-called Victory Meeting of the Iowa State Bar Association will be held at Davenport, June 26 and 27, 1919.

The address of welcome will be delivered by Hon. Joe R. Lane, of Davenport; the response by Mr. Milo Hanzlik, of Cedar Rapids; the president's address by Hon. Henry L. Adams, of Des Moines. An address will be delivered by Gov. Frank O. Lowden, of Illinois. A paper will be read by Judge Henry Silwold, of Newton, on "The Constitution and the Courts." The annual address will be delivered by Hon. Samuel J. Graham, Assistant Attorney General of the United States, on "The Legal Profession as Related to Government."

There will be an interesting round table discussion on code revision, led by James H. Trewin, J. C. Mabry and U. G. Whitney, of the Iowa Code Commission.

The annual banquet will be given June 26th at the Blackhawk Hotel.

REPORT OF THE MEETING OF THE VIRGINIA BAR ASSOCIATION.

The thirteenth annual meeting of the Virginia Bar Association was held May 15, 16 and 17, 1919, at Richmond. The meeting was largely attended and the program and discussions were most interesting.

There were over 200 present, out of a membership of 670, with probably 100 or more still in military service.

The president's address was delivered by Mr. Lucian H. Cocke of Roanoke, who spoke on the subject, "Reconstruction Times." The annual address was delivered by Hon. Frederick R. Coudert of the New York Bar, whose subject was, "Law v. Diplomacy in the Proposed Constitution of the League of Nations."

Papers were read by Judge Martin T. Burke on the subject, "Revision of the Code," and by Dr. R. M. McElroy on "Campaign for the Study of the Constitution."

REPORT OF THE MEETING OF THE FLORIDA STATE BAR ASSOCIATION.

The twelfth annual meeting of the Florida Bar Association met at Atlantic Beach, Fla., June 10 and 11, 1919.

The association was welcomed by Mr. Reuben Ragland of Jacksonville, and the president's address by Mr. Wm. Hunter of Tampa. The annual address was delivered by Hon. Walter A. Harris of Macon, lately Brigadier Gen-

eral of the U. S. Army, whose subject was, "A Constitutional Army."

Other addresses were delivered as follows: Hon. C. O. Andrews, whose subject was "Legal Status of the Prohibition Amendment"; Hon. James E. Calkins on "The Revised Statutes of 1920"; Mr. H. P. Adair of Jacksonville on "Ganancial Rights"; Hon. O. K. Reaves of Bradentown on "Protecting the Courts"; Mr. H. R. Trusler, Dean of the Law School of the University of Florida, on "Legal Education in Florida"; and Mr. P. O. Knight of Tampa, Vice President and Counsel for American International Ship Building Corporation, on "Hog Island."

HUMOR OF THE LAW.

The dry wind doth blow
And we'll have H2O;
And what will the souses do then, poor things?
They'll drink sarsaparilla,
Crushed peach, and vanilla,
And save up a fortune or two, poor things.
—New York Tribune.

Close Friend—I hear that your son doesn't take kindly to the law.

Big Lawyer (grimly)—Perhaps you wouldn't either if you'd been arrested three times for violating traffic ordinances."—Buffalo Express.

Secretary of State Lansing slipped out of the council chamber and went souvenir hunting in the palace. Luck was with him, he said, for he found a remarkable piece of antique wall paper.

Next day a frantic Japanese stenogrpaher was looking for his shorthand notes.—Harvard Lampoon.

For one so young, his knowledge was extensive in the extreme. All things that came to his hand he read—novels, newspapers or blue books.

"Father, I heard Uncle Bill is going to be married on Friday."

"Yes," said his father. "Uncle Bill has only three days more."

The progressive youngster sighed. "The last three days, father," he said, "they give them everything to eat they ask for, don't they?"—St. Louis Star.

Secretary Carter Glass was talking at a Washington reception about the Texas oil boom.

"The boom," he said, "has made a lot of men rich in the neighborhood of Ranger. A lot of men, too, it has left poor.

"Two Rangerites were talking in the Oklahoma Eating House about a Sapulpa millionaire who was buying leases and boring wells and making money fast.

"'Why did you knock Sapulpa Joe so hard?' said the first Rangerite. 'He's not a bad sort. In his time he's done a number of good things.'

"'Yes, durn it; And I'm one of them,' the second Rangerite growled."—Globe-Democrat.

One of O. Henry's best stories was written about a man named Fuzzy. Henry borrowed the name from Fuzzy Woodruff, a newspaper man he knew a few years ago in New Orleans. Woodruff, at last accounts, was on the news staff of the old Chicago *Inter Ocean*, and may still be in Chicago, where he was long an institution.

No quotation marks are needed around the odd front name that Woodruff bears, for it is actually, legally and irrevocably Fuzzy.

Some years ago Woodruff, who had originally been christened Lorenzo, was in Montgomery, Ala., covering the state legislature for a newspaper in Birmingham. He was widely acquainted and liked, and members of the assembly used to comment good-naturedly upon Woodruff's hair, which is curly and of a fine silken texture. Somebody began calling him "Fuzzy" and the name spread through the capitol.

On the final day of the session, the customary amount of horseplay was in evidence in the halls of the legislature. A member of the lower house introduced a bill declaring that the name of Lorenzo Woodruff had long since passed into disuse and setting forth some twenty-one reasons, "for the good of the greatest number," why the said Woodruff should henceforth be known as "Fuzzy Woodruff." The bill went through all the formalities, was passed by the lower house, protested in the senate and made the subject of excited debate there, and finally ratified by a majority vote. Then it was sent to the governor, who signed it, and the measure became a part of the records of the state of Alabama.—*John Nicholas Beffel.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client.**—Practice Law.—The right to practice law is not one of a citizen's inherent rights, but is a privilege which may be granted within prescribed regulations under the exercise of the state's police power, and the granting of a license is a judicial and not a mere ministerial act.—In re Adkins, W. Va., 98 S. E. 888.

2. **Bankruptcy** — Preference. — Where the treasurer of a corporation, who had supplied practically all of its capital, and who had been led to believe that a claim against the corporation was unfounded, though other corporate officers knew it was well founded, paid over to himself on his own claims practically all of the corporate assets, held, that such payment was preferential, for the corporation was charged with knowledge of all of its officers.—In re Boston-West Africa Trading Co., U. S. D. C., 255 Fed. 924.

3. **Banks and Banking**—Lien on Deposit.—The right of a bank under Civ. Code, § 3054, to enforce its lien upon a deposit and appropriate it in the extinguishment of the depositor's matured indebtedness, is not dependent upon the consent of the depositor.—First Nat. Bank v. Coplen, Cal., 179 Pac. 708.

4. **Carriers of Goods**—Classification.—Where a railroad company inspects and classifies as pitch material which is claimed to be asphaltum, and enters into a contract with a shipper to transport it for a given sum, the contract is binding, notwithstanding that the rate charged is less than the author.zed tariff rate, in the absence of a showing of mistake.—West Const. Co. v. Seaboard Air Line Ry. Co., Tenn., 210 S. W. 633.

5.——Initial Carrier.—Initial carrier could by contract limit its liability for shipment to a foreign country to its own line; the Carmack Amendment not being applicable to such shipment.—Chicago, M. & St. P. Ry. Co. v. Jewett, Wis., 171 N. W. 757.

6. **Carriers of Live Stock**—Published Rates.—Under the Carmack Amendment to the Interstate Commerce Act (U. S. Comp. St. 1916, §§ 8604a, 8604aa), the published rates, based upon valuation, of interstate carrier, are presumed to be equally within knowledge of carrier and shipper, and both are bound by them as matter of law.—Bassett v. Chicago & N. W. Ry. Co., Wis., 171 N. W. 749.

7. **Carriers of Passengers**—Acceptance of Passenger.—A carrier is not required to accept as a passenger one without an attendant who is mentally incapable of caring for himself.—Chicago, R. I. & G. Ry. Co. v. Sears, Tex., 210 S. W. 654.

8. **Common Carrier**—Reasonable Charges.—A common carrier, if it can reasonably do so, must receive and transport all freight tendered to it, with legal charges, but the rule is not absolute, and like all other rules, has its exception.—Miller Engineering Co. v. Louisiana Ry. & Nav. Co., La., 81 So. 314.

9. **Corporations**—Costs.—An attorney's fee as part of the "costs" cannot be recovered in an action for an accounting charging individual defendants with fraud, conspiracy and misappropriation of funds of defendant corporation, in which plaintiff's decedent was a stockholder.—McArthur v. John McArthur Co., Cal., 179 Pac. 700.

10.——Internal Affairs.—The issuing of stock is a corporate act which is regulated and controlled by the laws of the incorporating state, and which, relating to the internal conduct and management of the corporation, is exclusively subject to such laws.—In re Fryeburg Water Co., N. H., 106 Atl. 225.

11.——Officers.—The officers of a corporation cannot make a valid agreement with an agent that will enable him, after its insolvency and while it is enjoined from transacting any business or disposing of any assets, to collect money on account of corporation and appropriate it in payment of his individual claim.—O'Neil v. Burnett, Pa., 106 Atl. 246.

12.——Promoters.—Where contract of corporation with its promoters was procured by fraudulent representations or concealment by promoters, corporation can sue promoter for damages or for an accounting, or it could rescind contract and recover back consideration paid.—Arney v. Brittain & Co., Iowa, 171 N. W. 697.

13.——Ultra Vires.—An act of a corporation is properly said to be "ultra vires," when it is beyond the powers conferred upon the corporation.—Richardson v. Bermuda Land & Live Stock Co., Tex., 210 S. W. 746.

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16. **Contracts**—Act of God.—If a party by contract creates an absolute or unconditional obligation, the performance of which rests on himself, he is bound to make it good or to answer in damages, notwithstanding any act of God or inevitable accident, because he might have provided for such contingencies by his contract.—Prather v. Latshaw, Ind., 122 N. E. 721.

17.——Benefit.—A benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made, is a sufficient consideration.—Chandler v. Riley, Tex., 210 S. W. 716.

18.——Excusing Performance.—Where parties are excused from further performance of a contract by a valid legislative act or by some intervening cause over which they have no control, neither party can recover consequential damages by reason of the other's non-performance.—Bell v. Kanawha Traction & Electric Co., W. Va., 98 S. E. 885.

19.——Illegal Consideration.—A separation of the good consideration from that which is illegal in a contract will not be made where party asking to enforce contract is himself the one who has made and breached the illegal consideration.—Mission Brewing Co. v. Rickert, Cal., 179 Pac. 720.

20.——Mistake by Fact.—A mistake in fact is one of the fundamental grounds of equitable relief, and if an agreement is entered into by mutual mistake between the parties as to their rights, either is entitled to have it set aside.—Bach v. Interurban Ry. Co., Iowa, 171 N. W. 723.

21.——Mutuality.—For a contract to be "mutual," an obligation must be thereby imposed upon each party to do or permit something to be done in consideration of the act or promise of the other, and, unless both are bound by the contract, neither will be bound thereby.—Neola Elevator Co. v. Kruckman, Iowa, 171 N. W. 743.

22.——Performance.—Where plaintiff has performed contract in part, and its further performance has been prevented by defendant's act, he may either sue for the breach or he may sue for compensation for work actually performed.—Hoefflin v. Wilkerson, Ky., 210 S. W. 667.

23.——Waiver of Right.—No agreement to waive an existing legal right is valid unless it rests upon a consideration deemed legally sufficient.—Keller v. Washington, W. Va., 98 S. E. 880.

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28.——Judicial Notice.—Unless required by statute, courts do not take judicial notice of the ordinances and by-laws of municipal corporations.—Miles v. City of Montgomery, Ala., 81 So. 351.

29.——Plea in Abatement.—A plea in abatement of an information for a felony because defendant had not had a preliminary examination, required by Const. art. 2, § 17, and had not waived it, must be made prior to pleading to merits of case.—Hensley v. State, Okla., 179 Pac. 788.

30. **Death**—Corporation.—A municipal corporation is not a "person or corporation" within Vernon's Sayles' Ann. Civ. St. 1914, art. 4694, giving action for death "caused by the wrongful act * * * of another person or corporation."—City of Dallas v. Halford, Tex., 210 S. W. 725.

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32.——Repugnancy.—Where a deed conveyed a fee tail and attempted to pass the reversion to others in default of heirs of the grantor's body, nothing passed by the reversion; estates in tail having been converted by Revisal 1905, § 1578, into estates in fee simple, and the reversion thereby cut off.—Sharpe v. Brown, N. C., 98 S. E. 825.

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36.——Judicial Notice.—Court will take judicial notice of the bitter border warfare along Kansag-Missouri border during Civil War.—Doneghy v. Robinson, Mo., 210 S. W. 655.

37.——Self-Serving Statement.—Plaintiff architect, suing for services, could not make evidence for himself by writing to defendant a letter stating facts relative to his alleged employment and services, and mailing it to defendant, and such letter could not be used to establish his case.—Sargent v. Lord, Mass., 122 N. E. 761.

38.——Similar Acts.—Among inferences which, except under certain conditions, the law will not permit to be drawn, is that a person has done a certain act because he has done a similar act at another time.—Nance v. Western Union Telegraph Co., N. C., 98 S. E. 838.

39. **Fixtures**—Trade Fixture.—A complete refrigeration plant in a hotel, none of machinery, pipes or boxes constituting any part of support of building or any of its walls, so that its removal would do no more than leave brackets attached to walls and apertures in walls requiring plastering thereof, would constitute a "fixture," under Civ. Code, §§ 660, 1013, as between grantor of hotel and grantee, relying in good faith on appearances and without notice of anything to the contrary, yet it was not so incorporated that it could not be detached, under section 1019, as a "trade fixture."—Marker v. Williams, Cal., 179 Pac. 735.

40. **Frauds, Statute of**—Oral Agreement.—Where a contract for the sale of corn is in writing, an oral agreement extending the time for delivery, and not otherwise modifying or altering the written contract, or interfering with its enforcement, does not involve the statute of frauds.—Neola Elevator Co. v. Kruckman, Iowa, 171 N. W. 743.

41.——Privity.—Assignee of bankrupts' lease after its acceptance was liable on terms and covenants, by reason of privity of estate, for rent accruing during time it was owner of

leasehold interest; statute of frauds constituting no defense.—Harmon-Wastcoat-Dahl Co. v. Star Brewing Co., Mass., 122 N. E. 753.

42. **Fraudulent Conveyances**—Husband and Wife.—Where, under deed from husband, wife became absolute owner, she had right to convey in trust for purpose of liquidating debts of husband, and where conveyance to trustee, and by him to husband, was in furtherance of trust, creditors of husband could not complain, and deed by husband and wife to the purchaser of the property would not operate as an assignment for benefit of husband's creditors, under Ky. St. § 1910.—Best v. Melcon, Ky., 210 S. W. 662.

43. **Garnishment**—Foreign Attachment.—The plaintiff in a foreign attachment may attach in his own hands moneys belonging to the defendant.—G. B. Hurt, Inc., v. Fuller Canneries Co., Pa., 106 Atl. 248.

44.——Municipality.—It is the settled policy of the state to hold immune from garnishment all municipalities and other governmental agencies.—Dickens v. Bransford Realty Co., Tenn., 210 S. W. 644.

45. **Gas**—Increasing Rates.—A gas company which has contracted to furnish gas to a city and its inhabitants for a term of ten years at fixed rates cannot be given the right by a court of equity to violate its contract and increase its rates because war conditions have rendered them unprofitable.—City of Moorhead v. Union Light, Heat & Power Co., U. S. D. C., 255 Fed. 920.

46. **Homicide**—Dying Declaration.—The fact that a physician told deceased that he could not live and that, if he had any statement concerning anything he wanted to come out in his case, to make it to him, would not render inadmissible the statements of deceased.—State v. Burton, S. C., 98 S. E. 856.

47. **Husband and Wife**—Alienation of Affections.—The right to recover damages for the alienation of a wife's affections does not have to rest upon alienation, which culminates in divorce.—Eklund v. Hackett, Wash., 179 Pac. 803.

48.——Consideration.—Where a husband receives a wife's property for investment, and acknowledges in writing the validity of her claim against him, and seeks to defer payment until satisfaction of his other debts, her acceptance of statement, if not based on a valuable consideration, will not waive her right to participate with his general creditors.—Keller v. Washington, W. Va., 98 S. E. 880.

49. **Insurance**—Construction of Contract.—In construing a life insurance policy for the purpose of ascertaining its legal effect, since the contract is expressed in language selected by the insurer all doubts as to its meaning should be resolved in favor of insured.—Underwood v. Jefferson Standard ? N C

50.——Iron Safe Clause.—An inventory stating neither the value nor the grade of the grain on hand, but giving only the quantity, held not a substantial compliance with the portion of the iron-safe clause requiring taking inventory, since by it the value of the stock insured could not be ascertained.—Hartford Fire Ins. Co. v. Walker, Tex., 210 S. W. 682.

51.——New Policy.—A contract of one company assuming the liabilities of another company does not constitute an issuance of a new policy upon the life of one dead at the date of such contract, nor an extension of the period of limitation which had begun to run.—Simmons v. Western Indemnity Co., Tex., 210 S. W. 713.

52. **Judgment**—Conclusiveness.—In the absence of fraud, a judgment for want of an affidavit of defense or for other default is as conclusive as when entered upon a verdict.—Exler v. Wickes Bros., Pa., 106 Atl. 233.

53.——Extinguishment.—The general doctrine is that payment of a judgment or debt by one of several joint debtors extinguishes the debt as to all.—Green v. Bolster, Mass., 122 N. E. 740.

54.——Nullity.—A judgment on a bail bond cannot be set aside by the court after the expiration of the term at which it was rendered, where the bond was valid and the judgment was not a nullity.—United States v. Buchanan, U. S. D. C., 255 Fed. 915.

55.——Partition.—A judgment against remaindermen rendered in a suit for partition does not bar a subsequent suit to recover their remainder interest, where the former judgment was erroneous on its face, in that the court, as a court of equity, failed to grant relief to which the parties were entitled on the case stated by them.—Ellison v. Mattison, S. C., 98 S. E. 840.

56.——Res Judicata.—Where a judgment did not go to the merits, but only dismissed plaintiff's petition in an action to quiet title, because she was not in possession of the property, plaintiff may still institute and maintain an acton in ejectment.—Taylor v. Wilson, Ky., 210 S. W. 670.

57.——Setting Aside.—Where a fact essential to support judgment for plaintiff is entirely lacking, judgment must be set aside.—Williamson v. Rabon, N. C., 98 S. E. 830.

58. **Landlord and Tenant**—Conversion.—A landlord, who took a stove of a tenant for rent, when the tenant in fact owed no rent, was guilty of conversion.—Salley v. Parker, S. C., 98 S. E. 847.

59. **Libel and Slander**—Injury to Profession.—To call a school-teacher insane in connection with her conduct in her business was actionable per se, without proof of special damages; the remark imputing to her a mental condition which wholly unfitted her for her duties, particularly where it was also stated directly that she was unfitted for the position she held.—Wertz v. Lawrence, Col., 179 Pac. 813.

60.——Privilege.—In suit for slander, a plea of privilege, in appearing at request of investigating committee of an Order of Druids considering plaintiff's application for membership, and stating that plaintiff had negro blood, was not an absolute, but a qualified, privilege.—Berot v. Porte, La., 81 So. 323.

61.——Privilege.—A communication is qualifiedly privileged where the person is so situated that it becomes right in the interest of society that he should tell third persons certain facts, and such communication must be made in good faith.—Finkelstein v. Geismar, N. J., 106 Atl. 209.

62. **Limitation of Actions**—Starting Time.—The statute of limitations never applies to express trusts until and from the time the trustee repudiates the trust by unequivocal words or acts, and such repudiation is brought to beneficiary's notice so as to require him to promptly assert his rights.—Keller v. Washington, W. Va., 98 S. E. 880.

63. **Malicious Prosecution**—Attachment.—To maintain an action for malicious attachment, the plaintiff must allege and show that the attachment was vacated in the action in which it issued on the ground that it was unwarranted by the facts, or that he had no opportunity to make a motion to vacate it.—Furst v. W. B. & W. G. Jordan, Minn., 171 N. W. 772.

64. **Marriage**—Indian Marriage.—A marriage according to the Indian custom, and a living together as man and wife according to such custom, is a lawful marriage, and renders the offspring legitimate.—Meagher v. Hajjo, Okla., 179 Pac. 757.

65. **Master and Servant**—Imputed Knowledge.—It is only when men of ordinary prudence and observation would have observed, under like circumstances, that a servant's opportunity for knowledge can be held the equivalent of "imputed knowledge."—E. I. Dupont de Nemours & Co. v. Taylor, Va., 98 S. E. 866.

66.——Independent Contractor.—The building owner or one at whose instance a new party wall is constructed after removal of a single wall on land of the adjoining owner, as authorized by Act June 7, 1895 (P. L. 135), is not liable for consequential damages, where the work was done by an independent contractor, without supervision by the building owner.—Jackman v. Rosenbaum Co., Pa., 106 Atl. 238.

67.——Respondeat Superior.—Although automobile dealers allowed their demonstrator to use demonstration car for his own enjoyment,

they would not be liable for injury done by him while so driving the car; he not being in the master's business in such driving any more than any one who might hire or borrow the car.—Van Cleave v. Walker, Tex., 210 S. W. 767.

68.——Safe Place and Tools.—A master must use the care which an ordinary prudent man would exercise under the same circumstances to furnish his employe a safe place and safe tools and appliances; the degree of care being commensurate with the dangers attending employment.—Clinton & O. W. Ry. Co. v. Dunlap, Okla., 179 Pac. 749.

69.——Warning.—The use by a manufacturing company of removable steps leading down to the floor of a boiler room from an outer door, without warning to employes that they were removable and were frequently removed for cleaning the floor, held negligence, which rendered it liable for injury to an employe who unknowingly stepped through the door when they were not in place.—Burgess Sulphite Fibre Co. v. Gagne, U. S. C. C. A., 255 Fed. 872.

70. **Mortgages**—Deed Absolute.—A written deed absolute in terms cannot be changed into a mortgage, except upon allegation and proof that the clause of reuemption was omitted by reason of ignorance, mistake, fraud or undue advantage.—Williamson v. Rabon, N. C., 98 S. E. 830.

71.——Foreclosure.—Where mortgagee, in foreclosing property, failed to join owner of record, to whom mortgagor had sold premises, as a party in the proceedings, purchaser at foreclosure sale is not entitled to premises as against such record owner.—Hubbard v. Dahlke, Mo., 210 S. W. 652.

72.——Fraud.—The mere failure of mortgagee to carry out its alleged oral promise to mortgagors as to indulgence as to time of payment was not actionable fraud, entitling the mortgagors to void their agreement.—Downing v. Brennan, Mass., 122 N. E. 729.

73. **Municipal Corporations**—Ordinance.—An ordinance is not a "law" in one sense of the word, but is a local law emanating from legislative authority and operative within its sphere as effectively as general law of the sovereignty.—Choice v. City of Dallas, Tex., 210 S. W. 753.

74. **Nuisance**—Statute.—A business authorized by the Legislature is not a public nuisance unless the powers granted are negligently exercised.—State v. Riggs, N. J., 106 Atl. 216.

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76. **Party Walls**—Common Grantor.—Where deed conveys to center line of party wall, with right to use it as such, and deed from common grantor conveys adoining lot and building to center of wall, subject to other grantee's rights, cross-easements in the whole of the wall are vested in each grantee, and it is a party wall, which each may use as such.—Gates v. Friedman, W. Va., 98 S. E. 892.

77. **Patents**—Presumption.—While decisions of the Court of Appeals of the District of Columbia in interference proceedings are not conclusive in the courts, they are presumptively correct on questions of fact, and not subject to collateral impeachment, except for gross mistake or fraud.—Webster Electric Co. v. Podelsak, U. S. D. C., 255 Fed. 907.

78. **Partnership**—Agency.—The law of partnership is a branch of the law of agency, the functions, duties and rights of the partners in a great measure comprehending those of agents, and the general rules of law applicable to agents being alike applicable to partners, for each is not only a principal, but also a general and authorized agent of the firm and of each partner for all purposes within the scope and objects of the firm.—Cummings v. S. Funkenstein Co., Ala., 81 So. 343.

79. **Powers**—Appointment.—A power of appointment, to be exercised by "a written instrument signed, sealed and acknowledged," is well executed by a holographic will of the person in whom the power was vested, making disposition of the subject-matter thereof, by virtue of Code 1913, c. 77, § 44 (sec. 3869).—Ruffner v. Broun, W. Va., 98 S. E. 872.

80. **Principal and Agent**—Undisclosed Principal.—Where defendant was receiving lumber from a partnership in payment of a firm debt to him and without knowing the firm had incorporated, continued to receive lumber from the same parties, they were undisclosed agents of the corporation principal, and where he settled with them he is not liable to the corporation.—White v. Kincaid, Cal., 179 Pac. 685.

81. **Property**—Possession.—The possessor of personal property is prima facie the owner, and the presumption of ownership arising from such possession is not disputable by a trespasser who does not connect himself with the true title.—Birmingham Southern R. Co. v. Goodwyn, Ala., 81 So. 339.

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